United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

75-1350

To be argued by
FEDERICO E. VIRELLA, JR.

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1350

UNITED STATES OF AMERICA,
Appellee,

—v.—

PETER EVANS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Peter Evans appeals from a judgment of conviction entered on September 22, 1975, in the Southern District of New York, following a four day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment 73 Cr. 135, filed February 5, 1973, charged Peter Evans and co-defendants Deborah Ann McKinney and Thomas Evans in Count One with conspiracy to distribute narcotic drugs and in Count Two with distributing 39.08 grams of cocaine hydrochloride on September 22, 1972. Title 21, United States Code, Sections 812, 841(a)(1) 841(b)(1)(A) and 846, and Title 18, United States Code, Section 2.

On August 14, 1975, trial commenced as to Peter Evans * and concluded on August 19, 1975, when the jury found him guilty on both counts.

On September 22, 1975, Peter Evans was sentenced to concurrent three years terms of imprisonment, execution suspended, and was placed on probation for three years. Evans is currently on probation.

Statement of Facts

The Government's Case

Thomas Evans testified that in September, 1972, he was living with Amy Wachtel, a girl-friend, at apartment 22, 17 St. Marks Place in New York City and that during this time he knew Peter Evans, the defendant, whom he had met in 1968 (Tr. 34-35, 116).** In the latter part of 1968, Evans had lived near the defendant, who resided at 84 East 3rd Street in New York City. There the two had had a conversation concerning the possible sale of some LSD (Tr. 36). During the conversation, the defendant told Evans that he had some LSD tablets which he had obtained from California and asked Evans if he wanted some. The defendant also told Evans that the LSD tablets were available in quantities of 25 or single doses. Evans took some tablets, sold them, and subsequently gave some of the money from the proceeds of the LSD sale to the defendant (Tr. 37-38).

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* On March 9, 1973, Thomas Evans pled guilty to Count Two of the indictment. On May 4, 1973, Thomas Evans was sentenced by Judge Ward as a young adult offender to two years imprisonment, execution suspended, and probation for three years. Count One was dismissed.

To this date Deborah Ann McKinney remains a fugitive.

** For the sake of clarity this brief will hereafter refer to Thomas Evans as "Evans" and to Peter Evans as the "defendant." The designation "Tr." refers to the pages in the trial transcript, GX to Government's exhibits.

In the middle part of September, 1972, Evans went to a below street basement apartment at 324 East 6th Street where the defendant was then living (Tr. 39, 119). There the defendant asked Evans if he would like to snort some cocaine. Evans agreed, and the defendant took him to the kitchen, where the defendant took some cocaine out of a tin foil wrapper. The two men then snorted the cocaine.

A couple of days later the defendant telephoned Evans and asked him to come over to his apartment (Tr. 39-40). After Evans arrived, the defendant told him that he had some cocaine in his apartment, but that he was a little nervous since he thought it might be a little "hot." The defendant asked if Evans would keep his cocaine in Evans' apartment. In return the defendant offered to pay Evans' rent of $125 and to give Evans some cocaine for his personal use (Tr. 41-42). In addition, the defendant told Evans that he would bring the cocaine over to Evans' apartment later that same evening and that the cocaine should be kept in a cool place. After the conversation, Evans returned to his St. Marks' Place apartment, where, later that evening, he met the defendant (Tr. 42). The defendant gave Evans a little piece of tinfoil with some cocaine for Evans' personal use, which Evans hid in a soap dish, and a grapefruit-sized plastic bag containing cocaine, which Evans placed inside a wooden case in his living room (Tr. 42-44). The defendant then requested a set of keys so that he could have access to the apartment to get the cocaine when Evans was not at home. Evans agreed to have the keys made and to furnish them on the following day (Tr. 44, 122).

On the following afternoon, Evans, having already obtained the keys, met the defendant at Evans' apartment. Evans gave the keys to the defendant, who then asked for the cocaine bag. From the bag the defendant took

out a small bag of cocaine and weighed it on a scale (GX 4) which he had brought with him. The defendant put the smaller bag of cocaine into his shoulder bag and gave the larger bag of cocaine back to Evans, who returned it to the wooden case. (Tr. 45).

That evening, Evans, nervous because of recent burglaries in his apartment, began to look for a different place to hide the cocaine. During his search of the apartment, Evans, noticing a loose floorboard in the bedroom, pried it open and, having transferred the cocaine bag to a microscope box (GX 5), placed it inside the floor. Evans then put the floorboard back in place and placed a trunk over it (Tr. 47-48). A short time later, Evans told Amy Wachtel that he was hiding cocaine for the defendant (Tr. 50-51, 118-122).

A day or two later, the defendant brought a girl named Debbie (co-defendant Deborah Ann McKinney) to Evans' apartment. After introducing them to Amy Wachtel, Evans showed the defendant and McKinney the cocaine in its new hiding place in the floor. Evans then took the microscope box and gave it to the defendant, who opened it and took out a small packet of cocaine. The defendant then placed the packet on the scale, weighed it, and put the packet in his shoulder bag. The defendant then returned the remaining cocaine to Evans. (Tr. 51-53, 120-121).

On the following day, the defendant and McKinney returned to Evans' apartment and told him they wanted some cocaine. McKinney and the defendant entered the bedroom, remained there for five minutes, came out and left. When Evans went to the bedroom, he saw white powder both on the scale and on a palette knife he had previously furnished to the defendant for use in measuring the cocaine. Evans proceeded to wipe them clean (Tr. 53-55).

The following day—a couple of days before Evans' arrest of September 23, 1972—Evans met the defendant and McKinney in the apartment. At that time, he told the defendant to be more careful in not leaving any dust on the scale. The defendant agreed to comply in the future. After this conversation, both the defendant and McKinney entered the bedroom for a few minutes and left (Tr. 55-57).

Thomas Dolan, a Drug Enforcement Administration agent, testified that on September 22, 1972 he was working in the area of Sixth Street and First Avenue in New York City as an undercover agent. At that time, he was introduced by another undercover agent and a confidential informant to Deborah Ann McKinney (Tr. 129-130, GX 6). McKinney and Dolan discussed his purchasing from her $975 worth of cocaine. While talking over the deal, the four walked towards a parking lot where Dolan showed McKinney the $975 in cash. They also discussed future deals for cocaine for the following week. McKinney agreed to sell the cocaine and told Dolan that she would get the cocaine and meet him at Seventh Street and Avenue A by Tompkins Square Park (Tr. 130-132).* Dolan met McKinney at the prearranged location fifteen minutes later. There, McKinney wanted to give Dolan the cocaine, but Dolan insisted that the deal take place in his car. The two then walked to Dolan's Cadillac, which was parked on Fifth Street and First Avenue. Once inside the car, McKinney took from her

* Peter Pallatroni, a Drug Enforcement agent, testified that on September 22, 1972 he was on surveillance duty in the area of First Avenue and Fifth and Sixth Streets, where he saw Dolan and the two other men engaged in a conversation with McKinney. When McKinney left Dolan, Pallatroni followed her to 324 East Sixth Street. There, she walked down the stairs and entered a basement apartment. Ten minutes later she walked back to the area of Sixth Street, where other agents picked up the surveillance on McKinney (Tr. 160-164).

pants a multi-colored napkin wrapped around a clear plastic bag containing the cocaine (GX 1). Dolan conducted a test which proved successful (Tr. 133-135, 137-138; GX 1).* After the test, Dolan told McKinney that the money was in the trunk of the car and asked her to press the trunk release button in the glove compartment of the car to open the trunk.** After McKinney pressed the button for the trunk release, the remaining Federal agents in the area approached the car and arrested McKinney and Dolan (Tr. 136).

After McKinney's arrest, Dolan, Pallatroni and other federal agents obtained a search warrant for apartment 22 at 17 St. Marks Place. There, Thomas Evans and Amy Wachtel were arrested. During the search the agents entered the bedroom, lifted the loose floorboard and seized the microscope box (GX 5) containing a package of cocaine (GX 2) and a scale (GX 4); from the bathroom they seized a soap dish containing cocaine in a tinfoil wrapper (GX 3) (Tr. 56, 117, 140-146, 165).***

The Defendant's Case

The defendant Evans presented no evidence.

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* Dolan testified that he had a test kit which included a vial with a chemical in it—cobalt thiacyanate. After a sample of the powder from the package that McKinney gave him was mixed in the vial, the liquid turned blue, indicating a positive reaction for cocaine (Tr. 134-135).

** Unknown to McKinney, the opening of the trunk of the car was a pre-arranged "bust signal" for the surveillance agents indicating that the deal was completed. (Tr. 135, 162).

*** It was stipulated the cocaine in GX 1 was 85.8% pure cocaine hydrochloride, the remainder being an adulterant of sodium bicarbonate; that the cocaine in GX 2 was 78.0% pure cocaine hydrochloride, the remainder being an adulterant of sodium bicarbonate; and that the cocaine in GX 3 was 83.4% pure cocaine hydrochloride, the remainder being an adulterant of carbonates (Tr. 146-151). The stipulation was received in evidence as GX 7 (Tr. 180).

POINT I

There Was No Error Committed In Admitting Into Evidence The Sentencing Minutes Of Thomas Evans Which Sought To Explain The Full Events Surrounding His Sentence.

The defendant attacks his conviction on the ground that Judge Motley erred in admitting into evidence the minutes of Thomas Evans' sentencing before Judge Ward two years before this trial. He argues that the sentencing minutes are replete with hearsay statements of the sentencing judge and the Assistant United States Attorney bolstering the credibility of Evans and that the introduction of those minutes deprived him of a fair trial. This contention is without merit.*

During an extensive cross-examination of the main Government witness, Thomas Evans, the defendant sought to establish that Evans had not only testified falsely but also that the Government ("they"), in return for his testimony, made a deal with Evans which ultimately wiped out his conviction. The cross-examination went as follows:

> "Q. There came a time, did there not, when you decided you would cooperate with the government? A. Yes.
>
> Q. It was partially, I assume, in response to that offer of cooperation by you that you were released on a personal recognizance bond, is that correct? A. Yes, sir.
>
> Q. I would assume somewhere along the line Mr. Mukasey told you, that was the Assistant you dealt with, was it not? A. Yes.

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* The sentencing minutes (GX 8), as ultimately submitted to the jury, are reprinted in full in the appendix at the end of this brief.

Q. Mr. Mukasey indicated to you that things would be better for you if you cooperated with the government, is that correct? A. Yes.

Q. And there came a time when you did take a plea, right? A. Yes.

Q. And as a result of that plea you did not go to jail, is that correct? A. Yes.

Q. As a matter of fact, the two year sentence was suspended and you were given three years probation, right? A. Yes.

Q. And somewhere along the line they indicated to you that even that probation might be shortened, right? A. Yes.

When for the first time did you know that you would be testifying in this case for real? A. Maybe three or four weeks ago.

Q. Was that at about the time when they indicated that they would terminate your probation, at about the same time?

The Court: Who is they, Mr. Gold?

Mr. Gold: The government.

Mr. Virella: Who is the government? Is it the Probation Department or the U.S. Attorney's office.

The Court: The question isn't clear, Mr. Gold. Who do you mean by they?

Q. Did there come a time when you were told that your probation would be terminated favorably for you? A. Yes, there was.

Q. And as a matter of fact didn't they indicate to you that the entire conviction would be set aside? A. Yes." (Tr. 104-106).

By this time it was clear that the defendant had successfully created the impression for the jury that Evans had been generously rewarded for his testimony by some sinister agreement among the Court, the United States At-

torney's office and the Probation Department. Defense counsel's questions failed to clarify which agency was responsible for setting aside the conviction and for what purposes. The prosecutor asked for a side bar conference:

> "Mr. Virella: Your Honor, Mr. Evans was sentenced as a young adult offender at the time he entered his plea and was sentenced by Judge Ward if that be some kind of explanation as to whatever the term means of wiping off his conviction—
>
> Mr. Gold: You have redirect. Factually I think I am accurate.
>
> The Court: Well, no, because you are running together two things. You have a right to ask this witness whether he was promised anything by the U.S. Attorney if he would testify for the government. What you are bringing out is that the Court was somehow involved in this, the judge and his reducing his sentence as a part of an agreement with the government which I am sure is probably not true.
>
> Mr. Gold: That is not my intention.
>
> The Court: You shouldn't lead the jury to believe that judges are involved in making deals with people who testify for the government unless you have some direct proof of that.
>
> Mr. Gold: None. Quite the contrary.
>
> The Court: That's what's happening now. This man, as Mr. Virella points out, was sentenced as a youthful offender and under the law the judge has the duty to review his probation conduct and have his sentence wiped out if his probation record merits it. Now, he has a legal and lawful duty to do that quite aside from any promise which may

have been made to this witness by the government, so you are running two things together.

Mr. Gold: Unintentionally. My apologies to the judiciary." (Tr. 106-108).

Defense counsel then briefly went into other matters on cross-examination and concluded his questioning of Evans with the following:

"Q. On July 26[*] your conviction was set aside pursuant to the Youth Correction Act, is that correct? A. That is true." (Tr. 108).

The Government could not be expected to remain silent in the face of a claim, developed by defense counsel in cross-examination and presumably to be fully exploited in his summation, as indeed it was,[**] that it had procured

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* This was less than three weeks before the trial began. Evans had been sentenced in May, 1973; the defendant was not apprehended until 1975.

** Thus, the defendant argued in summation:

"Tommy Evans you recall admitted to being down to Mr. Virella's office a dozen or so times in two weeks prior to this trial. He indicated that each trip was about an hour or two hours in Mr. Virella's office. He said that errors were corrected. Try to visualize that, a young man who is facing, what, on one count as the Judge indicated in the sentencing, minutes, 15 years. Two counts, three [sic] years. This was a very cooperative, very scared young man and he was down there a dozen or so times, an hour or two each time. The only comment I think I could reasonably infer from that is that there must have been an awful lot of errors to correct in the course of preparing Mr. Thomas Evans for trial in this case.

Now, why would Thomas Evans permit himself to be used in this way? Would the possibility of jail, 15 years, maybe 30 years have affected his thinking?

Would that kind of a threat over your head worry you in any way? Do you think that that might assist you in coloring your testimony? Would you want to be tried

[Footnote continued on following page]

false testimony by promising Evans special treatment, including shortening his probation and setting aside of conviction—a claim which, if credited by the jury, would have an effect broadly detrimental to the Government's case. Accordingly, the Government in its re-direct examination of Evans began to read certain parts of the minutes of Evans' sentencing,* the defendant objected and the following colloquy took place at the side bar.

[*Footnote continued from preceding page*]

and convicted on the testimony of a young man with a gun like that to his head?

If you had an offer of cooperation—now, over my objection that 3506, Government's Exhibit 8, has been admitted into evidence. You will have an opportunity to read it if you desire. That is the break that Tommy Evans got. That is a break he got in exchange for offering to testify in this case, offering to testify against Debbie McKinney and pleading guilty. That's a heck of a break. Do you think that that affected his testimony in this case in any way? You will notice a gentleman's name, Mr. Mukasey, he is the Assistant U.S. Attorney. Certain things are said on the record. Now, there are other things that are said in the privacy of an Assistant U.S. Attorney's office. What you are seeing in those minutes is just the tip of tha iceberg. I believe Mr. Evans was finally let go, his case was thrown out, he is not a convicted man at this point on July 28th, just a week and a half, two weeks before this trial started. It is not coincidence at all. I wish you could have had a transcript of what occurred in Mr. Mukasey's office prior to the time they went into Judge Ward for the final disposition of Tommy Evans' case. I have been in Assistant U.S. Attorneys' offices prior to going into the Judge for disposing a case. I have represented people in Tommy Evans' position. Enough said. The only other thing I would like to point out in reference to that is he was supposed to be getting three years probation. H was sentenced in '73 and it should be running out in '76 and even that was terminated early. He was given the carrot prior to the time he crossed the finish line" (Tr. 205-207).

* "Q. Do you remember what Judge Ward said to you at the time of your sentence? A. No, I don't.

[Footnote continued on following page]

"The Court: Just a moment. You brought this out on your cross-examination of this witness, inferring, as I just said, that the Judge was somehow a party to this and gave this man a favorable sentence and wiped out his conviction because he testified for the government. You brought that out.

Mr. Gold: I am not saying he has no right to go into some of these issues that I originally raised on cross-examination. I just would like to know what he intends to read before he does the damage, if any. I don't think he has the right to read the entire transcript.

Mr. Virella: Well, your Honor, there is background. He has tainted the judiciary in his cross-examination of the defendant, he has tainted the

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[*Footnote continued from preceding page*]

Q. Do you remember Judge Ward telling you the following:

'Mr. Evans, you have been here now and have heard the Court speak relative to two prior cases. I come now to yours. From my reading of the presentence report you are an intelligent and extremely able young man. I would say from your IQ, although I gather you did not go to Yale, in other things you are a person who has potential.'

Mr. Gold: Excuse me, what page is that?

Mr. Virella: This is 3506, page 6.

Mr. Gold: Thank you.

By Mr. Virella:

Q. 'So far I would say that you have not realized that potential, but I would be optimistic enough to think you are still young enough——'

Mr. Gold: Objection, your Honor.

The Court: What is the objection?

Mr. Gold: May we have a side bar?

The Court: Yes.

(At the side bar.)

Mr. Gold: I would like to have an offer of proof, your Honor. He is reading all the statements made by the Judge. I respectfully submit most of them are irrelevant." (Tr. 110-111).

office of the United States Attorney that something improper was done and we have a right to present this to the jury so they get a full and complete picture.

The Court: Yes.

Mr. Gold: I would like to know what he is going to read.

The Court: When he gets to something that you think is objectionable I will hear it.

Mr. Gold: I just don't think he has the right to laud the character of this witness through Judge Ward's statements by calling out the parts he wants to read.

The Court: Overruled." (Tr. 111-112) (emphasis added).

When re-direct examination resumed and additional parts were read to the witness, the defendant did not make any objections,* nor did he engage in any re-cross-examination of the witness (Tr. 112-114).

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* "The Court: All right, you may proceed, Mr. Virella.

Q. 'So far I would say that you have not realized that potential, but I would be optimistic enough to think that you are still young enough that that may not be something impossible to achieve. I thought about your case as I thought about the others and I wondered what could or should be done with you in order to assist you in getting on a path that could lead you away from the problem that brings you here today. I have concluded that supervision is necessary. That supervision will be to your ultimate advantage. I could under the circumstances of this case send you to prison for a very lengthy period. My understanding of my power is that I would have the power to send you to a prison for a maximum term of 15 years, which is a long, long time. I do not intend to do that. I believe that by admitting what you did by testifying as you did you deserve consideration. I decided in your case a sentence of two years would be appropriate. I further decided to suspend the execution of that sentence. Finally, as I

[Footnote continued on following page]

Subsequently, the Government moved to introduce into evidence the complete transcript of Evans' sentencing minutes. At that time the following transpired:

> "The Court: All right. Do you have anything to say, Mr. Gold?
>
> Mr. Gold: Yes, your Honor. I have no objection to the first request, namely entering the stipulation, but I do have an objection to the second. The pertinent parts which the government wishes to introduce have been read. I think it would be extremely prejudicial to have the entire thing introduced in evidence so that the jury can peruse it. *If he wants just those portions that were read available for the jury to peruse I would have no objection to those portions being photocopied, marked and introduced in evidence.*
>
> The Court: What do you object to in the rest of it? I don't understand.

[*Footnote continued from preceding page*]
indicated a few minutes ago I believe that a period of supervision is necessary and I am therefore placing you on probation for a period of two years subject to the standing probation order of this court. I hope that this involvement with the law will be your last. I hope that you can recognize that there are people in this society who may take advantage of you. You must recognize those and not permit them to do that.'

Do you remember Judge Ward saying that to you? A. Yes, I do.

Q. Do you further remember Judge Ward telling you the following:

'I will note for the record'——

Mr. Gold: Page, please?

Mr. Virella: Page 8 at the bottom, line 23.

Q. 'I will note for the record that I designate the defendant for young adult offender treatment. Frankly, I am not sure how that changes matters in view of the fact that I have set the matter down for probation, but to the extent it is beneficial to Mr. Evans I note in the record that he is going to be given young adult offender.'

Do you remember that? A. Yes, I do."

Mr. Gold: There are certain things that are mentioned in there which are alien to the case which are not in the government's direct case which both sides have studiously tried to avoid.

The Court: For what, for example? I haven't read the document, so I am in the dark.

Mr. Gold: One of the items is that Debbie Ann McKinney, the young lady who allegedly made a sale to the undercover agent, is a fugitive.

The Court: What else?

Mr. Gold: Just the general colloquy between the Court, defense counsel and Mr. Mukasey I believe has no part in this trial.

Mr. Virella: Your Honor, that was brought out during the direct and cross-examination of Mr. Evans during the trial and Mr. Gold himself brought all these tainting materials out of the sentencing Mr. Evans, or the suggestions had been made during his cross that there were some improper things done between the government, between probation and between the Court. I think the sentencing of Mr. Evans as reflected in the minutes has been gone into and here the jury can have the public record of the sentencing of Mr. Evans for its aid in any part of its consideration it wishes.

The Court: I think that you went into some of this with Mr. Thomas Evans when he was on the stand, did you not? You read part of it to the jury?

Mr. Virella: I did, your Honor.

Mr. Gold: Over my objection, your Honor.

The Court: Mr. Gold, I don't understand your proposition, that you can open up a subject on

cross-examination of a witness and the government is precluded from going into that on redirect. I don't understand that to be the law. I understand that if you open up a subject like this on cross-examination or any other subject the government can go into that on redirect. As the government points out on the cross-examination you tended to insinuate to the jury that the Judge was party to plea bargain agreement with Thomas Evans and the government, that if he would cooperate with the government the Judge would give him a lesser sentence, a youthful offender sentence and then wipe out his conviction. That you clearly insinuated to the jury. The government therefore had the right to show that the Court was not a party to that, that the Court on its own initiative granted the defendant Thomas Evans youthful offender treatment and the Court was not a party to the plea bargain agreement, that all the government does in these cases is to bring to the attention of the Judge, the sentencing Judge, that the defendant has cooperated with the government. That doesn't make the Court a party to any agreement that if you cooperate with the government the Court will deal leniently with you.

Mr. Gold: Judge, we have gone through this before and I never intended to insinuate or intended to tend to insinuate that the Court was a party to any promise made to the defendant. Those minutes indicate that the Court, in view of Mr. Thomas Evans cooperation and his willingness to testify against the defendant presently on trial and to testify against Deborah Ann McKinney if and when she is apprehended were the things that prompted the Judge to give Thomas Evans the light sentence that he did get.

The Court: Then you have no objection to the document going in evidence.

Mr. Gold: Judge, I do have an objection. In spite of the fact that there are things in there that are proper, I feel it will tend to confuse and add issues to this case that do not belong in the case.

The Court: Overruled. The objection is overruled and the other exhibit may be marked in evidence as a government exhibit, the stipulation. It is probably unnecessary because you have read it into the record, but it may be received." (Tr. 176-179) (emphasis added).

The jury during its deliberations requested the sentencing minutes of Evans. Prior to its submission, the defendant requested that a certain portion of the minutes be redacted and his request was granted (Tr. 274-280).

The defendant contends that it was error to admit these minutes, which he claims improperly bolster the credibility of and the testimony of the witness. However, it is a basic principle that a trial judge has the extensive discretion in controlling the scope of cross-examination, and such discretion is particularly broad with respect to redirect and re-cross-examination. *United States* v. *Kahn*, 472 F.2d 272, 281-282 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Dorfman*, 470 F.2d 246 (2d Cir. 1972), *cert. dismissed*, 411 U.S. 923 (1974). Equally established is the rule that if a subject was opened up by defendant's cross-examination of a Government witness, the Government is not bound to let defendant bring out only what he pleases as he pleases and allow the jury to be left with an erroneous impression. See *United States* v. *Finkelstein*, Dkt. No. 75-1154 (2d Cir., December 1, 1975), slip op. at 859; *United States* v. *Harvey*, Dkt. No. 75-1053 (2d Cir., November 20, 1975), slip op. at 6506-6507; *United States* v. *Tramunti*, 513 F.2d 1087, 1118 (2d Cir. 1975), *cert.*

denied, — U.S. —, 44 U.S.L.W. 3201 (October 7, 1975); *United States* v. *Miller*, 381 F.2d 529, 537 (2d Cir. 1967), *cert. denied*, 392 U.S. 929 (1968); *United States* v. *Agueci*, 310 F.2d 817, 834 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States* v. *Lev*. 276 F.2d 605, 608 (2d Cir.), *cert. denied*, 363 U.S. 812 (1960). In this case there was no doubt that there was a serious danger that, because of Evans cross-examination, the jury had been misled as to what occurred at the time of Evans' sentence, the legal consequences of that sentence, the extent of the Government's participation in the sentence, its reduction and its ultimate erasure under the Youth Correction Act, and the impact of all this on Evans' motive, if any, to testify favorably to the Government. Consequently, the issue of Evans' motive had to be fairly and fully put to the jury, *United States* v. *Mahler*, 363 F.2d 673, 677 (2d Cir. 1966), and, as the cases cited above make clear, the Government was entitled to secure the jury's consideration of Evans' credibility on an accurate and complete record and not the distorted picture defense counsel tried to paint through misleading questions. This was particularly true because of the broadbrush implication of governmental impropriety suggested by the defense's questions. Cf. *United States* v. *Gerry*, 515 F.2d 130, 139-140 (2d Cir. 1975); *United States* v. *Rivera*, 513 F.2d 519, 528 (2d Cir. 1975).

While it is claimed that the Government sought to do this through incompetent hearsay evidence, that contention is without merit. Evans' state of mind as to his arrangements with the prosecution and the basis for his sentence were, as all agree, of substantial significance to his credibility. The minutes of his sentencing, disclosing what Evans had been told by the Court and what the Court had been told by the prosecutor in Evans' presence on these very issues, were admissible to prove his understanding and state of mind in this regard. *United States* v. *Chason*, 451 F.2d 301, 304-305 (2d Cir. 1971), *cert.*

denied, 405 U.S. 1016 (1972). The sentencing minutes thus were not hearsay; moreover, no objection on hearsay grounds was made, nor was there a request for a limiting instruction.

In this Court the defendant's principal claim is that admission of the minutes was particularly improper because their content was little more than an encomium of Evans' credibility by Judge Ward and the Assistant United States Attorney who handled the case at the time. Much of this claim, even if it had merit, is foreclosed by the absence of a proper objection at the time the passages upon which the defendant's argument principally depends were put before the jury, which occurred during the redirect examination of Evans; defense counsel's only objection then was that he wanted to know beforehand what would be read (Tr. 111-112). E.g., *United States* v. *Rose*, Dkt. No. 73-2760 (2d Cir. November 19, 1975); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966). Later, when the Government offered the entire sentencing minutes, defense counsel specifically disclaimed any opposition to the receipt of the portions already read, objecting only to one remark that was later deleted before the jury received the minutes and to "the general colloquy between the Court, defense counsel and Mr. Mukasey", which was nevertheless received. (Tr. 176-179, 274-280). Thus, the only portion of the sentencing minutes received over the timely and specific, if it was that, objection of defense counsel was the "general colloquy", which hardly supports the claim now made and most of which was merely what Evans had earlier testified, without objection, the prosecutor had told him he would tell the Court in return for Evans' cooperation. But an examination of the entire minutes, including the portions relied on which were received without relevant objection, establishes that although Judge Ward did comment favorably on certain

aspects of Evans' character, neither he nor the prosecutor vouched for Evans' credibility or could be understood to be placing an imprimatur on testimony given over two years later.

POINT II

The Trial Court Did Not Improperly Limit The Defendant's Cross-Examination Of Evans.

The defendant claims that the court erred in precluding defense counsel from cross-examining Evans with respect to the minutiae of his way of life and his psychiatric and mental history. These contentions are without merit.

In support of his first contention, the defendant asserts that he was prevented in [illegible]'s cross-examination of Evans from showing the jury that Thomas Evans, and not the defendant, was a major drug dealer and that "he sought to show this through the years of Evans' gallivanting around the country without viable means fo support" (Brief at 29). The record below clearly indicates the opposite. In fact, a major portion of Evans' cross-examination specifically dealt with these areas. Thus, defense counsel did delve into endless details of Evans' life as far back as 1965, when Thomas Evans graduated from high school and began to travel from New York to California (Tr. 67-68); counsel also elicited from the witness the various and specific places and dates he visited and lived, such as San Francisco, Fresno, Mexico, New Orleans, Baltimore, Canada, California and Pennsylvania, whom he lived with, and the reasons for his travels. Defense counsel cross-examined Evans on the names on the doorbells of the building where Evans resided (Tr. 64). He further elicited Evans' sources of income during various periods of time, which included working at a bookstore (Tr. 63), and renting farm houses in Fresno (Tr. 73-74). The trial court, contrary to what the defendant argues,

did permit defense counsel to delve extensively and in great detail as to the witness' drug life style. (Tr. 68-69, 80-81).* Nevertheless, it soon became apparent that much of questioning by the defendant was irrelevant; the Court asked the defense counsel to approach the bench, and asked defense counsel for an offer of proof. Counsel responded that he wanted to show the jury that Evans was the major drug dealer. The Court replied that:

> "I am not precluding you from showing that. I am precluding you from going into some very minute detailed description of this man's activities. The jury has a right to wonder, as I do, how this is relevant and whether or not it is wasting time. You can bring that out. I am not precluding you from bringing that out, but we don't need these utter details." (Tr. 76).

It is well-established that the trial judge has broad discretion in restricting the scope of cross-examination. *United States* v. *Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975); *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975); *United States* v. *Kahn*, *supra*, 472 F.2d at 282; *United States* v. *DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971). Accordingly, since what the Court admonished defense counsel for was detailed and irrelevant questioning about matters having little, if anything, to do with Evans' drug activities, the argument that cross-examination was erroneously restricted in the area of Evans' drug life style, which was more than adequately exposed, is totally unconvincing.**

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* Counsel established that Evans used and sold numerous varieties of drugs since 1965.

** Additionally, the defense had ample opportunity to exploit Evans' motive for testifying on the behalf of the Government, as is discussed in Point I of this brief.

The defendant also argues that the trial court erroneously excluded any cross-examination on Evans' mental and psychiatric history. This, too, is without merit.

First, it should be pointed out that the defendant misstates the record in his brief when he claims that the trial court precluded him from questioning Evans on "the effects of his drug use on his perceptions" (Br. 30).* However, even taking the defendant's claim at face value, he is entitled to no relief.

Prior to trial and pursuant to subpoena, the Government obtained three separate psychiatric records pertaining to its principal witness, Thomas Evans. These records were either mailed directly to Judge Motley's chambers or to the Government, which in turn delivered the records to the trial judge for inspection. At a pre-trial conference, the Government, in response to the court's inquiries, informed both the court and the defendant that it intended to call Thomas Evans as a witness and that the psychiatric records which were in the possession of the trial court related to Thomas Evans, the witness, and not to Peter Evans, the defendant (Pretrial Conference, August 6, 1975, p. 13). Accordingly, more than one full week before trial the defense was on notice that Thomas Evans was going to be called as a Government witness and that he had undergone psychiatric treatment. At no time did the defense seek to inspect the psychiatric records or move for a competency hearing.

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* During the defendant's examination of Evans, the following questioning took place:

> "Q. During part of this period did you have any bad effects from the use of drugs? Did you have any recurrences of any hallucinatory experiences as a result of the use of LSD, for example? A. No, sir.
>
> Q. Do you find at that time that the use of marijuana or hashish created any hallucinatory effect in your? A. No.
>
> Q. You have never experienced a retripping experience after having used LSD? A. No.
>
> Q. What about peyote or mescaline? A. No." (Tr. 77).

On the day of trial and prior to the opening statements of counsel, Judge Motley, having read all the psychiatric reports and a memorandum of law submitted by the Government requesting that the defense be precluded from cross-examining Evans as to his psychiatric background, sealed the three psychiatric reports * and ruled:

> "that the defendant is not entitled to use those psychiatric documents in cross-examination of Thomas Evans, a government witness in this case, for the reasons set forth in the government's memorandum of law . . ." (Tr. 5).

The Court continued, addressing defense counsel:

> "the court in exercise of its discretion denies your request for the use of this psychiatric testimony. Now, I don't want to extend this proceeding by repeating the reasons set forth in the Government's memorandum, *but chiefly the Court concludes it has little or no bearing on the credibility of the witness in this instance . . .*" (Tr. 6) (emphasis added).

On appeal, the defense offers (Brief at 30-33) nothing more than the same conclusory arguments made before Judge Motley—"that the mental state of a witness has a bearing on his credibility" (Tr. 5); "It is my understanding that the witness has had continuing psychiatric treatment on an on and off basis and I think from the time of the plea until almost the present date he has had outpatient care. All of these things have a bearing." (Tr.

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* The three-court exhibits sealed were as follows: Court Exhibit 1, psychiatric records of the witness from Mt. Sinai Hospital; Court Exhibit 2, psychiatric records of Evans from the Fifth Avenue Center for Counseling and Psychotherapy; and Court Exhibit 3, psychiatric records of Evans from the Long Island Jewish Medical Center (Tr. 2-8).

7); and "it is all part of a continuing mental state or at least I should have the opportunity to delve into that to determine whether or not—" (Tr. 8). Thus the claim raised here is precisely that made and rejected in *United States* v. *Green*, 523 F.2d 229, 237 (2d Cir. 1975), for reasons fully applicable here. The vague and insubstantial nature of the assertion of relevance below, the absence of any showing that the psychiatric treatment Evans received was for a disorder which would have raised questions about Evans' competency or credibility as a witness, and the dangers of prejudice and undue distraction of the jury on a collateral issue all support Judge Motley's reasoned exercise of discretion in excluding inquiry into Evans' psychiatric history, a decision taken by the Court only after careful review of Evans' psychiatric records which the Government has subpoenaed for this very purpose.* *See also United States* v. *Barnard*, 490 F.2d 907, 913 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974). *Cf. United States* v. *Pacelli*, *supra*, 521 F.2d at 137, 140. In addition, here defense counsel got his point across to the jury anyway, for, despite Judge Motley's rulings both before trial (Tr. 2-8) and during cross-examination (Tr. 77-78), defense counsel persisted in asking questions, to which objections were sustained, about Evans' being "under the care of a physician for any psychiatric problem" (Tr. 79) and about his having been prepared by the prosecution to answer questions on cross-examination "with regard to hospitalization" and "with regard to psychiatric treatment on an out-patient basis" (Tr. 88).

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* Moreover, here, as in *Green*, while foreclosing cross-examination on a witness's psychiatric history, the Court allowed broad probing into other areas directly implicating the witness's credibility—e.g. Evans' deal with the Government and his longtime career as a user and seller of a virtual pharmacopoeia of drugs.

POINT III

The Trial Court Properly Received Into Evidence The 1968 LSD Transaction Between Evans And The Defendant.

The defendant claims that the Court committed prejudicial error depriving the defendant of a fair trial by the admission of the Evans' testimony about a 1968 LSD transaction with the defendant.* After hearing argument, the testimony was admitted by Judge Motley on the issue of the defendant's intent (Tr. 8-13, 246). The admission of this evidence was proper on this and several other grounds.

The law is well-settled in this Circuit that "evidence of other criminal offenses is admissible if it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value." *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). See also *United States* v. *Eliano*, 522 F.2d 201, 202 (2d Cir. 1975); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975); *United States* v. *Gerry*, *supra*, 515 F.2d at 140-141 (2d Cir. 1975).

Here, it is plain that the evidence was not offered to prove criminal character. Evidence of the defendant's earlier drug transaction with Evans was admissible to establish the existence and nature of their relationship, *United States* v. *Garelle*, 438 F.2d 366, 368 (2d Cir. 1970), *cert. dismissed*, 401 U.S. 967 (1971), *cf. United States* v. *Diggs*, 497 F.2d 391, 394 (2d Cir.), *cert. denied*,

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* Evans testified that in the latter part of 1968 the defendant gave him LSD tablets which the defendant had obtained in California. Evans sold the LSD tablets and gave the defendant some of the profits realized (Tr. 36-38).

419 U.S. 861 (1974), and was "relevant to prove that [the defendant and Evans] could well have been continuing along the same line" in their later cocaine dealings, *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *United States* v. *Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973). Indeed, absent this evidence of earlier drug involvement between Evans and the defendant, the jury might well have found implausible Evans' testimony about the defendant's readiness to recruit him as a "stash" for a large quantity of cocaine. *Cf. United States* v. *Bermudez*, Dkt. No. 75-1073 (2d Cir., November 6, 1975), slip op. at 449-450. In addition, the evidence of the earlier drug relationship between the defendant and Evans was relevant and probative of the existence, background, development and purposes of the conspiracy charged in the indictment. *United States* v. *Natale*, Dkt. No. 75-1276 (2d Cir., November 28, 1975), slip op. at 812-813; *United States* v. *Torres*, *supra*; *United States* v. *Papadakis*, *supra*, 510 F.2d at 294-295; *United States* v. *Cioffi*, 493 F.2d 1111, 1115 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974); *United States* v. *Cohen*, 489 F.2d 945, 949 (2d Cir. 1973); *United States* v. *Del Purgatorio*, 411 F.2d 84, 86-87 (2d Cir. 1969); *United States* v. *Costello*, 352 F.2d 848, 854 (2d Cir. 1965), *rev'd on other grounds*, 390 U.S. 201 (1968).

In the face of the clearly proper exercise of discretion below, the defendant attacks the admission of the evidence of the earlier LSD transaction, claiming that, while the Judge received it as proof of intent, "[t]he issue in this trial was whether or not Thomas Evans was telling the truth . . ." (Brief at 33), "intent is subsumed" in the issue of Evans' credibility (Brief at 34, 36), and, accordingly, the evidence of the LSD transaction was inadmissible under *United States* v. *DeCicco*, 435 F.2d 478 (2d Cir. 1970). But even if this evidence should not have been received as proof of intent, its admissibility

may be sustained on the other wholly sufficient grounds set forth above. *United States* v. *Torres*, *supra*, 519 F.2d at 727. Moreover, it is by no means clear that the evidence was not admissible in the trial judge's discretion to prove intent. The charges in the indictment required "the Government . . . [to] establish a 'specific' intent to violate the substantive statute beyond a reasonable doubt." *United States* v. *Bertolotti*, Dkt. No. 75-1107 (2d Cir., November 10, 1975), slip op. at 6428. Despite the focus of the defense on Evans' credibility as the principal issue in the case, defense counsel twice reminded the jury in summation that the Government had the "burden of proof beyond a reasonable doubt as to each element, each count . . ." (Tr. 203, 223). Thus "[t]he appellant's intent . . . was an essential element of the crime charged in the indictment, an element which the appellant never indicated below he did not consider to be in issue, and an element the Government had the burden of proving beyond a reasonable doubt." *United States* v. *Kaplan*, 416 F.2d 103, 104 (2d Cir. 1969). Evidence which tended to establish that intent was accordingly admissible. *Id.*

The defendant's exclusive reliance on *United States* v. *DeCicco*, *supra*, as requiring reversal here is misplaced. In contrast to this case, the Court in *DeCicco*, confronted by evidentiary excesses by no means present here, found no ground to support the admissibility of the "similar act" evidence received. Moreover, the Court's holding in *DeCicco* turned on a restrictive view of the admissibility of such evidence, 435 F.2d at 483-484, no longer applied in this Circuit either as to the grounds for admission, *e.g.*, *United States* v. *Papadakis*, *supra*, 510 F.2d at 294-295, or the circumstances under which admission is appropriate, *United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973).

POINT IV

The Trial Court's Instructions Regarding Reasonable Doubt, Presumption Of Innocence, And Accomplice Testimony Were Adequate And Proper.

The defendant asserts that the trial court's instructions merged the definitions of reasonable doubt and presumption of innocence, thereby confusing the jury, and further, that the trial court's instruction on accomplice testimony was error requiring a new trial. In fact, there was no error of any kind requiring reversal.

The defendant's claim that the trial court merged the presumption of innocence with the reasonable doubt instructions is not borne out by the record. A reading of the *entire* charge, particularly the parts concerning presumption of innocence and reasonable doubt, shows that the possible ambiguity perceived by the defendant can have had no significant effect on the jury. (Tr. 237-240, 264-268). See *United States* v. *Wolfish*, Dkt. No. 75-1138 (2d Cir., August 14, 1975), slip op. at 5636-5637; *United States* v. *Rosa*, 493 F.2d 1191, 1195 (2d Cir.), *cert. denied*, 419 U.S. 850 (1974).

In addition, the defendant claims that, among other things, the trial court's instruction concerning the accomplice testimony was improperly "apologetic" because it suggested that the Government often has to use accomplices in its efforts to obtain a conviction, where convictions would not be otherwise obtainable.* The contention is without merit.

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* Not surprisingly, the defendant's claims of error alleging the improperly "apologetic" nature of the trial court's instruction are unencumbered by any specific citations of decisional authority on point.

The trial court's instruction on the subject of the credibility of accomplice included the following:

> "Now, you realize, I am sure, that in the prosecution of a crime the government is frequently called upon to use persons as witnesses who actually participated in the crime charged. These persons are called accomplices. Often it has no choice. This is particularly so in the cases of joint ventures. Frequently it happens that only the members of the arrangement have evidence which is relevant to and important in a case. If accomplices could not be used there are many cases where there is real guilt and where convictions would not be otherwise obtainable.
>
> During the course of the trial you heard the testimony of Thomas Evans, who testified concerning his involvement in the crimes charged. He is therefore an accomplice. Under the law, in order for one to be an accomplice he must have been involved in the commission of the crime or crimes with which a defendant is charged. He must be a participant in that crime or crimes. An accomplice does not become incompetent as a witness because of his participation in the criminal act charged. His testimony is not be rejected unless you, the jury, think it has no weight or it could not be believed at all. Like any other testimony it is to be considered and dealt with the members of the jury. However, such evidence is properly considered with care and scrutiny, checked up with the other facts in the case and given appropriate weight.
>
> The testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty even though it is not corroborated or supported by other evidence in the case.

Again you should keep in mind that the testimony of an accomplice is always to be received with caution and weighed with great care. You are instructed that in weighing the testimony of government witnesses who are charged as co-conspirators in this indictment you may take into account any motive which you think the witness may have in testifying for the government.

Mr. Thomas Evans has also pleaded guilty. These facts, that is that he is an accomplice and that he has already pleaded guilty, do not disqualify him as a witness, but these facts may well affect the weight which you accord to his testimony." (Tr. 243-244).

The Court continued:

"Thomas Evans, as I have said, is also a defendant. He has pleaded guilty and has been sentenced. The fact that Thomas Evans has pleaded guilty, however, is not proof or evidence that the defendant on trial before you, Peter Evans, is also guilty. You must remember that guilt is personal and that the guilt or innocence of the defendant now on trial must be determined by you on the basis of the evidence adduced here at this trial before you which includes the testimony of all witnesses, the exhibits in evidence and the stipulations. The guilt of one person, therefore, is never to be predicated even in part on the guilt of someone else who has already pled guilty.

As I have told you, Thomas Evans, and as you know he has testified for the government and he is an accomplice, that is, a participant in the crime, his testimony therefore is to be scrutinized with great care, but again the fact that he is an accomplice, as I previously told you, does not disqualify him as a witness." (Tr. 245-246).

There was no prejudice to the defendant as a result of these instructions. The Court's instruction followed the instruction approved in *United States* v. *Corallo*, 413 F.2d 1306, 1322-23 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969), and other cases. E.g., *United States* v. *Bermudez*, *supra*, slip op. at 455; *United States* v. *Messina*, 481 F.2d 878, 880 (2d Cir.), *cert. denied*, 414 U.S. 974 (1973); *United States* v. *Ferrara*, 458 F.2d 868, 871 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972); *United States* v. *Augello*, 452 F.2d 1135, 1140 (2d Cir. 1971), *cert. denied*, 406 U.S. 922 (1972); *United States* v. *Phillips*, 426 F.2d 1069, 1071 (2d Cir.), *cert. denied*, 400 U.S. 843 (1970). Moreover, before the charge to the jury, the defendant did not submit a specific request to charge concerning accomplice testimony.

POINT V

There Was No Error Committed In The Court And Government Describing Cocaine As A "Narcotic Drug."

The defendant claims that he was deprived of a fair trial when the trial court permitted the usage of the term "narcotic drug" in describing cocaine. The claim is completely frivolous.

The indictment charged the defendant with conspiracy to distribute and with distribution of a "narcotic drug controlled substance"—cocaine. The statute itself defines cocaine as a narcotic drug:

> ". . . 'narcotic drug' means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis . . ."
>
> (A) Opium, coca leaves, and opiates . . ."
>
> Title 21, United States Code, Section 802 (16)(A).

There was no error of any kind by the Court in using the very words of the indictment and of the statute promulgated by Congress that defined cocaine as a narcotic drug. There was no proper showing on this point below, nor has the defendant shown any prejudice from the use of the term "narcotic drug" by the Court.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

FEDERICO E. VIRELLA, JR.,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

APPENDIX

Minutes of Sentence, May 4, 1973

(1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Cr. 135

UNITED STATES OF AMERICA
—against—

THOMAS EVANS,

Defendant.

Before:

HONORABLE ROBERT J. WARD,
District Judge.

New York, New York
May 4, 1973—3:30 p.m.

APPEARANCES:

WHITNEY NORTH SEYMOUR, JR., Esq.
United States Attorney for the
Southern District of New York

By: MICHAEL B. MUKASEY, Esq. and
ROBERT JUPITER, Esq.,
Assistant United States Attorneys

CHESTER L. MIRSKY, Esq.
Attorney for the defendant

(2)

The Clerk: United States of America versus Thomas Evans.

Is the government ready?

Mr. Mukasey: The government is ready.

The Clerk: Is the defendant ready?

Mr. Mirsky: The defendant is ready.

The Court: I note that counsel is present. That is Mr. Mirsky, is that correct?

Mr. Mirsky: That is correct, your Honor.

The Court: And this gentleman standing next to you is Thomas Evans, is that correct?

Mr. Mirsky: That is correct, your Honor.

The Court: Mr. Evans, according to my records you pled guilty on March 9, 1973 to count 2 of a two-count indictment which charged you with possession of a quantity of cocaine.

As I recall it, you told me at the time that someone had asked you to keep the cocaine for him and agreed that he would contribute money toward your rent.

I am about to impose sentence on you in connection with your pela, and I would ask you, before I do impose sentence, whether you wish to change your plea of guilty to count 2 of the indictment.

The Defendant: No, I don't.

(3)

The Court: Mr. Mirsky, is there any reason why sentence should not be imposed at this time?

Mr. Mirsky: No, there is not, your Honor.

The Court: Mr. Evans, is there any reason why sentence should not be imposed at this time?

The Defendant: No, sir.

The Court: Mr. Mirsky, I would note for the record that I received a letter from you dated April 30, 1973 together with substantial enclosures. I have read the letter and I have read the enclosures as well as the presentence report which was prepared by Mr. Norman Best of the probation department.

Minutes of Sentence, May 4, 1973

Is there anything you wish to say in Mr. Evans' behalf, or any other information you wish to present to the Court in mitigation of punishment?

Mr. Mirsky: No, there is not, your Honor.

The Court: Mr. Evans, do you have anything you wish to say in your own behalf or any information you wish to present in mitigation of the punishment?

The Defendant: No, sir, I do not.

The Court: I call upon the United States attorney and I ask him if he has any comments or recommendations prior to sentencing.

Mr. Mukasey: Yes, your Honor, I do.

(4)

The Court: Will you proceed, please.

Mr. Mukasey: I should point out to the Court, as I told Mr. Evans I would point out to the Court at this time, that after he was arrested on this charge that he cooperated fully with the government, as fully as his position in this incident made possible, which is to say he testified in the grand jury; he has committed himself to testifying at trial.

I suppose the only way his cooperation could conceivably have been greater would be if his involvement had been greater, and I don't think we can infer that. That really is all the government would have to add. Everything else would be set forth in the presentence report.

The Court: The material which I received from Mr. Mirsky is reflected, as a matter of fact, to a certain extent in the presentence report, so I think I have a very fair picture of Mr. Evans.

I gather that the other defendant to whom reference has been made, whose name also appears as Evans, is no relation to the defendant, is that correct, Mr. Mirsky?

Mr. Mirsky: That is correct, your Honor. (5) I mentioned that in the letter. They have the same last name but they are no relation.

The Court: That was my understanding, but that I've been told somewhere along the line, whether it was in your letter or in the presentence report.

Mr. Mirsky: I should mention to the Court that the aunt of the defendant, Mrs. Louisa Roberts, with whom the defendant has a sort of maternal relationship, is here on his behalf.

The Court: Is there anything she wishes to say to the Court? If so, she may rise and address the Court, or just rise and say she has nothing to add.

Mr. Mirsky: I don't think she has, but she wishes it to be known that she is here.

The Court: Thank you for coming. At a time like this it is very important to an individual who stands before the bar of justice to have people who are his friends to come here, as you have, and sit or stand beside him.

Mr. Evans, you have been here now and have heard the Court speak relative to two prior cases. I come now to yours.

From my reading of the presentence report, you are an intelligent, an extremely intelligent young (6) man. I would say from your I.Q.—although I gather you did not go to Yale—and other things, you are a person who has potential. So far I would say that you have not realized that potential, but I would be optimistic enough to think that you are still young enough that that may not be something impossible to achieve.

I have thought about your case as I thought about the others, and I wondered what could or should be done with you in order to assist you in getting on a path that could lead you away from the problem that brings you here today. I have concluded that supervision is necessary; that supervision will be to your ultimate advantage.

I could, under the circumstances of this case, send you to prison for a very lengthy period. My understand-

ing of my power is that I would have the power to send you to prison for a maximum term of fifteen years, which is a long, long time. I do not intend to do that. I believe that by admitting what you did, by testifying as you did, you deserve consideration. I decided in your case a sentence of two years would be appropriate. I further decided to suspend the execution of that sentence.

Finally, as I indicated a few minutes ago, (7) I believe that a period of supervision is necessary, and I am therefore placing you on probation for a period of two years subject to the standing probation order of this court.

I hope that this involvement with the law will be your last. I hope that you recognize that there are people in this society who may take advantage of you. You must recognize those people and not permit them to do that.

I hope within the period of your probation you will demonstrate for yourself and to yourself that you have the wherewithal, intellectually and in every other way, to be a contributing member of our society. We need people who can give of themselves for the benefit of society. We have too many who take from society. I hope that by the sentence I have imposed you will move forward in your life and be, as I say, a useful member of society and of our community.

I instruct you to report to the probation department on the second floor in order to begin your period of probation.

Mr. Mirsky: Might I just make one request, your Honor?

I had mentioned in my letter that Mr. Evans (8) was eligible for Young Adult Offender treatment, which application he made at the time of the plea, and I would request the Court in consideration of the sentence imposed to designate this man a Young Adult Offender for the purposes of this sentence. He was eligible for that at the time he took the plea. Although he was twenty-six

on April 19, at the time of the plea, he was under twenty-six, and he was eligible. I think that is verified by Mr. Best's report. I think that would be consistent with the Court's imposed sentence.

The Court: I would like to hear from Mr. Mukasey if he has any comment he wishes to make before I act on that request.

Mr. Mukasey: No, your Honor. I did have a request to make but it did not bear on that request.

The Court: In other words, you do not see any reason why in this case, since the plea was taken prior to age twenty-six, I could not designate the defendant here for Young Adult Offender treatment?

Mr. Mukasey: That is correct. I see no reason why that should not be done.

The Court: I will note for the record that I designate the defendant for Young Adult Offender treatment.

Frankly, I am not sure how that changes matters (9) in view of the fact that I have set the matter down for probation, but to the extent it is beneficial to Mr. Evans I noted in the record that he is to be given Young Adult Offender treatment.

Mr. Mirsky: Under the provisions of our code 18 USC, the defendant, if he is afforded the Young Adult Offender treatment is given the opportunities available to those defendants who were afforded youthful offender treatment so that it sort of falls into that category designated, and he has the opportunity if he successfully proves himself on probation and follows the mandates, to apply to this Court for an exoneration of his record.

The Court: I have noted that he is to be given that treatment and, hopefully, he will complete his probation in a satisfactory fashion, and you, on his behalf, can take what steps you believe to be appropriate.

Mr. Mirsky: We appreciate that very much.

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The Court: I believe, Mr. Mukasey, that you indicated that you did have something else that you wanted to bring to the Court's attention before we adjourn?

Mr. Mukasey: No, your Honor. I had thought I would ask that as a conditional condition of the probation, Mr. Evans keep our office apprised of his (10) residence during the period of probation; but since he will be under constant supervision, we can always check that from the probation department.

The Court: I think that will be available because he regular basis so that that will be taken care of.

Mr. Evans, I know you will be cooperating with the probation people. Needless to say, they will tell you this, and I am going to tell you now, in the event, when you are on probation you do move, you should promptly notify your probation officer of your new address where you can be reached, and if you have a telephone at that address, your telephone number. I know you will do that.

Teh Defendant: Yes.

The Court: Is there anything else, gentlemen?

Mr. Mukasey: No, your Honor.

Mr. Mirsky: Thank you very much.

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Federico E. Virella, Jr., being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 17th day of December, 1975, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

IRVING COHEN, ESQ.
299 Broddway
New York, N. Y. 10007

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Federico E. Virella, Jr.
FEDERICO E.VIRELLA, JR.

Sworn to before me this

17th day of December, 1975.

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977